SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1427

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—against—

RALPH WELLS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the

Supreme Court of the United States

October Term, 1975

No. .....

Air Line Pilots Association, International,

Petitioner,

—against—

Ralph Wells, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Air Line Pilots Association, International ("ALPA") respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 6, 1975, rehearing of which was denied on January 8, 1976.

Opinions Below

The opinion of Arbitrator Harry Platt for the Southern Airways, Inc. Pilots' System Board of Adjustment is set out in the Appendix to this petition, pp. 1a-24a. The unreported findings of fact and conclusions of law of the U.S. District Court for the Northern District of Georgia, Hon. Charles A. Moye, Jr., U.S.D.J., are printed at App. 26a-31a. The *per curiam* reversal by the United States Court of Appeals for the Fifth Circuit (Thornberry, Simpson and Roney, C.J.J.) is reported at 517 F.2d 132 and

set out at App. 32a-35a. The opinion of the Court of Appeals denying in part Ralph Wells' petition for rehearing and remanding to the District Court is reported at 522 F.2d 707 and set out at App. 37a-38a. The unreported order of the Court of Appeals, dated January 8, 1976, denying ALPA's petition for rehearing of the remand order is reproduced at App. 39a.

Jurisdiction

The decision of the Court of Appeals remanding this case for further proceedings in the District Court on Respondent Ralph Wells' claim of a breach of the duty of fair representation was entered on November 6, 1975. The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing *en banc* of petitioner Air Line Pilots Association, International with respect to the Court's November 6 order was entered on January 8, 1976. This Court has jurisdiction to review the remand judgment under 45 U.S.C. §§153(q) and 204, and 28 U.S.C. §1254(1). Jurisdiction in the District Court was predicated upon 28 U.S.C. §§1331 and 1337.

Question Presented

In a lawsuit under the Railway Labor Act by a discharged airline pilot, seeking to set aside the award of the Pilots' System Board of Adjustment which sustained the discharge as being for just cause, and for reinstatement and damages on the claim that the discharge was the result of alleged hostile collusion between the carrier and labor organization in breach of the duty of fair representation, did the Court of Appeals commit clear error in conflict with Supreme Court and other judicial authority by remanding the cause to the District Court for

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proceedings on the claim of wrongful discharge rather than dismissing the complaint, notwithstanding that a) the grievant voluntarily elected to submit to the System Board the very claims and issues on alleged wrongful discharge which he seeks to advance in District Court upon remand; b) the Court of Appeals refused to set aside the System Board award which resolved those claims against the grievant and held that the award was final and binding as the product of a fair hearing; and c) the grievant previously agreed that a decision which sustained the Board award was a bar to any further claims in the complaint?

Statutes Involved

The pertinent provisions of the Railway Labor Act, as amended (the "Act"), 45 U.S.C. §151 *et seq.*, are set out at App. 40a-41a.

Statement of the Case

a. *Background*

In the aspect considered by this petition,* the Court of Appeals proceedings present for review a sharp new challenge to the Federal labor policies sustaining the final and binding character of the awards of labor arbitration tribunals. The net effect of the proceedings below is to allow an unsuccessful grievant under the Railway Labor Act to relitigate the merits of his discharge in Federal Court although the adverse arbitral award was sustained by the Court as the product of a full and fair hearing on all issues. The Court held in effect that the grievant may

* Respondent Ralph Wells filed a petition for a writ of certiorari to review another aspect of the Court of Appeals decisions. No. 75-6081. Briefs in opposition were filed.

secure relitigation by advancing the claim that his discharge was the product of hostile collusion or breach of the duty of fair representation, by the union and carrier, notwithstanding that these very issues were voluntarily tried to the System Board of Adjustment and rejected in a decision which the Court held was final and binding in accordance with its terms.

b. *Parties*

Petitioner Air Line Pilots Association, International ("ALPA") is the pilot-representing organization under the Railway Labor Act on almost all U.S. certified carriers, including Respondent Southern Airways, Inc. ("Southern"). Respondent Ralph Wells is a former airline pilot who was discharged by Southern in 1969 on grounds of pilot incompetence. (App. 32a).

c. *System Board proceedings*

Following his discharge Wells elected to file a grievance (App. 33a) through the Southern Pilots' System Board of Adjustment ("System Board" or "Board"), established by the ALPA-Southern collective bargaining agreement pursuant to requirement of the Railway Labor Act, 45 U.S.C. §204 (App. 41a). Under the pilot contract, System Board awards are final and binding (App. 7a).

On Wells' hearing, the Board consisted of professional labor Arbitrator Harry Platt as presiding arbitrator together with two pilot and two management members. Wells at his election was represented by his own counsel. (App. 35a, n.5). In the hearing, Wells took the position that his discharge was the result of his employment as a replacement pilot on Southern during a 1960-1962 pilot strike, and Southern-ALPA collusion to have him discharged because of his role at that time, rather than sub-

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standard pilot competence. Wells' counsel objected to the composition of the Board in his hearing, but made no other objection to the Board's capacity to resolve the issues on the merits. Wells and Southern then stipulated that the hearing would proceed subject only to Wells' reservation of a right to test the Board composition in a later Court proceeding, without reservation of other rights. Wells then voluntarily submitted evidence on all discharge issues, including his claims of hostile collusion between ALPA and Southern and of competence as a pilot.

d. *System Board Award*

Following the three-day Board hearing, Arbitrator Platt issued an opinion (App. 1a-24a) in which he rejected all claims that the discharge was the result of any hostility or collusion on the part of Southern or ALPA and found that Wells was properly terminated for just cause in terms of competence as a pilot. (App. 22a-24a). With respect to collusion issues Arbitrator Platt noted, "Assumption is no substitute for reasonable probability as a measure of wrongdoing" (App. 23a), adding that "no one, except the aggrieved, seems seriously to believe that the relations between ALPA members and non-ALPA members have been so poor in recent years as to make a conspiracy to bring about Wells' discharge a reasonable probability." (*Id.*) On issues of pilot competence, the Arbitrator stated, in part,

> "A pilot entrusted with the lives of numerous passengers may surely be expected to attain and maintain a reasonable degree of proficiency and to exhibit competence in his flying, demonstrate sound judgment and utilize equipment to the safe and successful completion of his flight. What is not expected of such a pilot are displays of periodic deficiencies in judgment,

repeated lack of knowledge, and continued marginal or substandard proficiency. Wells' record shows not only a tendency to deviate from standard flight procedures but a lack of knowledge of those procedures." (App. 22a).

e. *District Court Proceedings*

Wells next brought this action in the U.S. District Court, Atlanta, to set aside the Platt award and for reinstatement, backpay and damages, claiming that he was denied due process in the Board proceeding, and that his discharge was the product of hostile collusion between Southern and ALPA. In the District Court, Wells took the position that he could not recover on the claims of hostile collusion and wrongful discharge unless the Platt award were first set aside as the product of an unfair hearing; this position was unchanged at any point until after the initial opinion of the Court of Appeals.* The District Court found that Wells was denied due process, set aside the Platt award, ordered the grievance remanded to a new System Board or other arbitration proceeding, and deferred decision on any other claims pending the new arbitration. (App. 31a).

f. *Court of Appeals Proceedings*

On appeals by Southern and ALPA the Court of Appeals reversed, finding that Wells received a full and fair

* For example, the District Judge stated at trial without objection by Wells, "[A]s I see it, if the System Board award stands, that's the end of the matter. So before you can go further you have to get past that hurdle." (Transcript of trial, p. 80). In his post-trial brief, Wells stated, "If there had been a proper proceeding before the system board leading to a valid award, that award would be an obstacle to plaintiff's action for wrongful discharge. * * * For plaintiff to get relief under either count, it is necessary that the award of the system board be overturned."

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Board hearing and decision, including due process and representation by his own counsel as he elected, creating a final and binding award as provided in the pilot contract. The Court stated in part:

> "Wells received a full hearing before the Board. He had full opportunity to present his claim that he was not discharged for incompetence, but for hostile discrimination against nonunion pilots by the ALPA, and company acquiescence in that discrimination. The Board resolved this claim adversely to Wells." (App. 35a).

Wells then petitioned for rehearing. In his petition, he claimed for the first time in either the District Court or Court of Appeals that he was entitled to press his claim for breach of the duty of fair representation—the contention that his discharge was the product of hostile collusion—notwithstanding the final and binding System Board award. The Court of Appeals denied Wells' petition in part, refusing to disturb its position that the Platt award was final and binding. Notwithstanding, it remanded the case to the District Court for further proceedings on Wells' claim that there was a breach of the duty of fair representation. (App. 38a). The sole authority for this action cited by the Court was *Czosek* v. *O'Mara*, 397 U.S. 25 (1970), although this case only holds that an employee is not required to exhaust adjustment board remedies under certain circumstances before filing a fair representation suit. The Court denied ALPA's subsequent petition for rehearing. (App. 39a).

g. *Supreme Court Proceedings*

Wells has petitioned for a writ of certiorari to review the holding that he was not denied due process or a fair proceeding in the System Board, and that he is bound by

the Board award; ALPA and Southern have filed briefs in opposition. No. 75-6081. The present petition seeks review only of the order which remands the case for consideration of Wells' claim of alleged breach of the duty of fair representation. It is on this one aspect of the case that the Court of Appeals' decision requires review. The Court's remand order directly conflicts with the recent decision of the Supreme Court in *Hines* v. *Anchor Motor Freight, Inc.*, —— U.S. ——, 91 LRRM 2481 (No. 74-1025, March 3, 1976). There this Court reaffirmed the principles of finality in labor arbitration proceedings and clarified the limits of the exceptions to finality. The Court held in accordance with the prevailing lower Court decisions (91 LRRM 2481, 2487, n.11), that the grievant dissatisfied by an arbitral award is not bound by "the contractual protection against relitigating an arbitral decision" where he successfully asserts "that the process has fundamentally malfunctioned by reason of the bad faith performance of the Union." 91 LRRM 2481, 2487. In that case the employee may join the union and employer as defendants; neither defendant may rely on the arbitral award as a bar to recovery. Just as clearly, the *Hines* decision marks the boundaries for bypassing the award in this type of case; it contemplates that where the arbitration has not malfunctioned by reason of the union's action or any other denial of due process the grievant is bound by the contractual finality of the award.

The same principle was clear in *Humphrey* v. *Moore*, 375 U.S. 335 (1964), where the Court held that an unsuccessful arbitration grievant could not set aside the award where he was not denied a fair hearing or fair representation in the arbitration itself. The principles of finality in the absence of proof within the narrow exceptions are even stronger in the present case than in *Hines* or *Humphrey*, since the Platt award was rendered by a professional arbi-

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trator on the System Board, an administrative tribunal established by statutory requirement, in contrast to the contractual bipartite proceedings in *Hines* and *Humphrey*.

Since the essence of Wells' claim which he voluntarily submitted to Arbitrator Platt for decision is precisely the same as any claim for improper discharge which he might seek to advance in the District Court upon remand, and since the Court of Appeals held that Wells received a full and fair hearing and decision on this claim before Arbitrator Platt, there is nothing left for Wells to litigate on remand in connection with his discharge. The Court of Appeals' remand order creates a wholly novel exception to the principle of finality, to the effect that the grievant may relitigate the merits of the grievance in Court by asserting that his discharge or other grievance claim was the product of the Union's breach of the duty of fair representation, notwithstanding that the Board award was upheld as a fair, final and binding decision on the same issues. Little remains of the finality principles following the disposition below. For this and other reasons to be presented, ALPA urges review of the Court's remand order.

Reasons for Granting the Writ

1. *The Court of Appeals' Disposition on Wells' Petition for Rehearing Is in Conflict With Applicable Decisions of This Court and the Courts of Appeals*

The Court of Appeals ordered this case remanded to the District Court for consideration of the claim of denial of fair representation solely on the authority of *Czosek* v. *O'Mara*, 397 U.S. 25 (1970). The Court read *Czosek* as holding that "a claim for the breach of the duty of fair representation is separate and distinct from plaintiff-appellee Wells' claim that the System Board procedure denied

him due process." (App. 38a). Contrary to the Court, *Czosek* v. *O'Mara* does not hold that an employee has the right to proceed against either the union or carrier after voluntary litigation on the same facts and issues in a full and fair System Board proceeding where there was no denial of due process or fair representation. *Czosek*, like prior Supreme Court decisions, only held that an employee is not required to exhaust adjustment board remedies under certain circumstances before filing a fair representation suit. For prior Supreme Court decisions see *Conley* v. *Gibson*, 355 U.S. 41 (1967); *Glover* v. *St. Louis-S.F.R.R. Co.*, 393 U.S. 324 (1969). For example, in *Glover*, the Court held that railroad employees could bring suit against the union and carrier for hostile collusion without exhausting the adjustment board remedy against the carrier if plaintiff could show that "a formal effort to pursue contractual or administrative remedies would be absolutely futile." 393 U.S. at 391. In *Czosek, supra*, applying the *Glover* principle, the Court only held that the union could be sued for breach of the duty of fair representation without exhausting adjustment board remedies where it was charged that the union had arbitrarily refused to process plaintiffs' claims through the adjustment board. Nothing in *Czosek* can be read as permitting further proceedings on a fair representation claim where the employee, with his own counsel, voluntarily litigated, sought and obtained a decision on the same collusion issues before a neutral arbitrator, with no denial of due process. This is particularly so where there was full acceptance of the award as a bar to further proceedings in the absence of denial of due process.

In contrast to *Czosek*, both *Humphrey* v. *Moore, supra*, and *Hines* v. *Anchor Motor Freight, Inc., supra*, deal explicitly with the binding character of arbitral awards actually rendered. As previously discussed, in *Humphrey*

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and *Hines* this Court has established that the grievant's right to proceed against his union or employer in this type of case after litigation on the same facts and issues in the arbitration, depends on establishing that he was denied due process or fair representation in connection with the arbitration. Otherwise, in the Court's words in *Humphrey*, "The decision of the [arbitration tribunal], reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is." 375 U.S. 335, 351. The Court of Appeals held that Wells received a full and fair hearing and decision on his claim of improper discharge in the System Board, including full hearing on the merits of the collusion issue. Wells has not "proved his case" (*id.*, 375 U.S. 335, 351) that he was denied due process and fair representation in the Board, and his complaint should therefore have been dismissed in its entirety.

The Court's disposition on Wells' petition for rehearing conflicts with prevailing decisions in the Courts of Appeals. For example, in *Steinman* v. *Spector Freight System, Inc.*, 441 F.2d 599 (2d Cir. 1971), *cited* in *Hines, supra*, 91 LRRM 2481, 2487, n.11, plaintiff lost in the arbitration, then sued his union and employer, alleging unfair representation in the grievance proceeding and breach of contract. The Court of Appeals reversed dismissal of the complaint, holding that the arbitration award was not a bar to suit or the same issues because plaintiff was denied a fair hearing in the arbitration. 441 F.2d 599, 603. At the same time the Court pointed out that under *Humphrey* v. *Moore, supra* and other decisions, "plaintiff could not sue if he lost in a fair arbitration." 441 F.2d 599, 603.

In *Margetta* v. *Pam Pam Corp.*, 501 F.2d 179, 180, (9th Cir. 1974), cited in *Hines* at 91 LRRM 2488, the Court stated that " an employee may not attack a final arbitration

decision '. . . except on the grounds of fraud, deceit or *breach of the duty of fair representation* unless the grievance was a "sham, substantially inadequate or substantially unavailable."'" (Emphasis in original). The same principle appeared to obtain in the Fifth Circuit prior to the disposition here. See, *Harris* v. *Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971), *cited* in *Hines, supra*, 91 LRRM 2481, 2488, n.11 and *quoted* in *Margetta* v. *Pam Pam Corp., supra*, 501 F.2d 179, 180. See also other cases cited in *Hines, supra*, 91 LRRM 2481, 2487-88, n.11. This Court should exercise its jurisdiction to eliminate the conflict between the circuits and to restore the applicable Fifth Circuit principles to their former uniformity with the decisions of this Court and the other Courts of Appeals.

2. *Respondent's Election of Remedies and Agreement That the System Board Award Was a Bar to Further Relief*

The remand order of the Court below is a departure from the accepted course of judicial proceedings, which precludes the assertion of a new ground for relief following explicit election of remedies and waiver of the right to proceed in Federal Court on any claim following lack of success on the basis submitted.

Wells "elected to challenge his discharge through the grievance procedure. . . ." (App. 33a) rather than through the Courts.* In the System Board the only objection made

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* At the time of Wells' discharge there was available a cause of action for damages based upon claims of unlawful discharge. See *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653 (1953), since *overruled* in *Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320 (1972). Wells might also have elected to commence, as an alternative to the System Board, a suit alleging carrier-union conspiracy resulting in his discharge. *Glover* v. *St. Louis S.F.Ry.*, 393 U.S. 324 (1969); *Richardson* v. *Texas & N.O.R.R.*, 242 F.2d 230 (5th Cir. 1957).

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by Wells' counsel to the proceeding was over the composition of the Board. Respondents Wells and Southern stipulated that the hearing would proceed subject *only* to Wells' reservation of a right to test the Board composition in a later Court proceeding. Wells voluntarily tried all issues surrounding his discharge on the basis of that stipulation. Throughout the District Court proceeding Wells recognized that the System Board award, if sustained, is an absolute bar to any further claims. This position was unchanged in the Court of Appeals—until that Court sustained the award. Wells then asserted for the first time that he wished to pursue additional claims notwithstanding the final and binding Board award.

The Court of Appeals improperly ignored Wells' voluntary election of remedies and waiver of a right to Federal Court trial on all issues involving the merits of his discharge if the System Board award was sustained. This action was a departure from the accepted course of judicial proceedings which should be corrected in this Court.

CONCLUSION

The Court of Appeals' decision to remand this case for further proceedings is a serious erosion of the principles of finality in System Board proceedings under the Railway Labor Act, as indeed in labor arbitration generally. For the reasons stated, it is respectfully requested that a writ of certiorari issue to review the remand decision, and that, upon review, the Supreme Court order the complaint herein dismissed in its entirety.

Respectfully submitted,

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SOUTHERN AIRWAYS INC. SYSTEM BOARD OF ADJUSTMENT

IN THE MATTER OF

THE DISCHARGE OF RALPH WELLS

NEUTRAL REFEREE'S OPINION

This appeal protests the discharge of Ralph Wells, a reserve captain. The appeal is pursuant to the provisions of the collective Agreement between Southern Airways, Inc. and the airline pilots in the service of Southern represented by the Air Line Pilots Association, International. Section 31(a)7 of the Agreement gives a dismissed pilot an option of appealing directly to a five-man System Board of Adjustment, thereby bypassing an appeal to the four-man System Board sitting without a Neutral Referee. The aggrieved, having exercised such option, the appeal was referred to a System Board comprised of the following: Harry H. Platt, of Detroit, Michigan, Neutral Referee; George M. Gross and W. C. Litty, Carrier members; Yancy Sims and James Bass, ALPA members. Hearings were held by the Board on June 3, 25, and 26, 1969 at which the aggrieved was represented by his counsel, William M. Pate, of Mitchell, Pate, and Anderson, Attorneys, and the Carrier by John Bacheller, Jr., of Fisher and Phillips, Attorneys. Both counsel filed post-hearing briefs which were received November 28 and November 30, 1969, respectively.

Ralph Wells, the aggrieved, was employed by Southern on January 17, 1960. Because a pilot strike was then in progress, Wells and other newly hired pilots started flying

as captains. At the conclusion of the strike, which lasted from June 5, 1960 to September 21, 1962, the striking pilots, all members of ALPA, returned to work with full seniority and those hired during the strike were either given employment as co-pilots or were furloughed and placed on a preferential hiring list. Wells, in line with his seniority, reverted to the status of co-pilot.

During his employment, Wells regularly took flight checks, once each year as a co-pilot and twice each year when he flew as captain. He also took trainer checks and written examinations at irregular periods. In December, 1964, he failed an annual check for the first time but passed a recheck two days later. In March, 1968 he received several unsatisfactory grades on a captain's recurrent flight check and failed to pass it. He failed also to pass a recheck the next day. After some additional training on the failed items, he passed a recheck. Apart from failed checks, Wells was disciplined in March, 1962 for ignoring a fire warning light in the cockpit and failing to discover that a portion of the exhaust collector ring around the engine had burned and fallen away. For this, he was demoted from captain to co-pilot for a period of four weeks and his airline pilot certificate was suspended by the FAA for the same period. On June 7, 1963 Wells was suspended for five days because he failed to be available for incidental flying on days when he was scheduled on reserve. In September, 1965, he was reprimanded for engaging in an altercation with another pilot while on duty.

On February 7, 1969, Wells was informed by letter that his employment was terminated effective February 5, 1969. The letter stated:

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Neutral Referee's Opinion

February 7, 1969

Mr. Ralph Wells
Box 263
Hapeville, Georgia

Dear Mr. Wells:

This will confirm our conversation whereby you are terminated effective February 5, 1969.

The reasons for this termination are as follows:

1. Taking off over gross weight at Tallahasse on January 28, 1969.
2. Unsatisfactory line check by the Atlanta Chief Pilot on January 31st.
3. Failure to pass a proficiency check on February 4th.
4. Your complete record as a pilot with Southern Airways.

Would you please return all issued manuals after which we will make arrangements for your final pay check.

Sincerely,

SOUTHERN AIRWAYS, INC.
W. Bayne Grubb
Vice President —
Flight Operations

WBG/jmf

Neutral Referee's Opinion

The aggrieved's and the Carrier's positions can be briefly summarized. Southern maintains that Wells was discharged for proper cause and its action was not arbitrary, unreasonable, or discriminatory. Its position is that Wells lacked ability to consistently perform his job as pilot at the level required to meet airline standards and, since past efforts to bring him up to an acceptable performance level had failed, the Carrier had no alternative but to discharge him. Southern justifies its action principally on the grounds stated in the letter of February 7, 1969. First, it points to an incident which it says reflects not alone a disregard of regulations and standard flying techniques but poor judgment. The incident involved taking off on a flight from Tallahassee and flying cross-country nearly 2,500 pounds overweight, thus endangering the safety of passengers and crew. Following on the heels of this incident, a co-pilot scheduled to fly with Wells refused to do so except under written protest. That led to Wells being given a flight check by the Chief Pilot to determine if he was qualified to continue flying — a check which he failed to pass and which prompted the V. P.—Flight Operations to give him a special proficiency check. Having failed that check as well, the V. P.—Flight Operations decided that Wells "had retrogressed to the point that he could no longer be used as a line pilot." Further, Southern maintains, Wells' record in its entirety shows a "series of marginal passes, failures and rechecks" which illustrate his deficiencies in judgment, ability, technique, and lack of knowledge of the essentials required by his duties and responsibilities as an airline pilot. Finally, Southern denies that Wells was discharged as a result of its or ALPA's hostile discrimination. A contrary claim, it says, "is supported only in Wells' imagination", not in any objective evidence.

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Neutral Referee's Opinion

Wells strongly protests his discharge. He contends his removal from flight duty was without justification and was arbitrary and lacking in honesty. He denies that his performance has been below the acceptable level of pilot performance. He notes that his abilities were checked and appraised at regular periodic intervals and that he satisfactorily met all requirements and was at all times regarded a standard pilot.

Regarding his performance and ability as a pilot, while he admits he erred in taking off from Tallahassee overweight, Wells claims he did so because fog had set in and he decided it was safer to leave than to remain. But in any case, he asserts, the ensuing flight checks by Chief Pilot Brown and V. P.-Flight Operations Grubb were irrelevant to the Tallahassee incident since that incident did not bring into question his ability to operate an airplane. Again, although conceding there was pilot error in his Birmingham landing during the line check by Chief Pilot Brown, the error was not a major one, in his opinion. Nor did he commit error in a Meridian landing during the same check, as claimed by the Chief Pilot. According to Wells, that entire flight showed minor errors at most. As for the proficiency check given by V. P.-Flight Operations Grubb, Wells acknowledges he had difficulty on a takeoff after a simulated engine loss and that in his effort to keep the plane flying he "had to disregard some more routine procedures." However, he denies that his takeoffs or holding patterns on that flight check were substandard.

Apart from questions of qualification, Wells' position is that his discharge was improper because it resulted from hostile discrimination by ALPA and therefore it cannot stand "even if the evidence otherwise showed a proper cause for discharge." He maintains his discharge was

brought about by ALPA members and by members of management sympathetic to ALPA and he particularly blames Chief Pilot Brown for his predicament because Brown, an active participant in the 1960-1962 strike, "developed a strong feeling of animosity toward persons working during the strike and towards Wells in particular." Further, he contends there was continued harrassment of him and other non-ALPA pilots by ALPA members after the strike, including being denied opportunities of making qualifying takeoffs and landings, as required by FAA regulations. By failing to correct this situation, he asserts, Southern must be deemed to have "participated with the ALPA captains in a program designed to place non-union pilots at a disadvantage." His brief states:

> Wells' discharge resulted from efforts of ALPA and its members, with the cooperation of members of management, like Captain Brown, whose main sympathies were with the union. Other members of management, if not sympathetic to the union, were unable or unwilling to resist it. The net result is that Wells was discharged because ALPA and its members wanted him to be discharged, a feeling which resulted from Wells' failure to support the strike and his nonmembership in ALPA.
>
> The case is thus one of hostile discrimination by a statutory bargaining agent toward a member of the bargaining unit which it represents. It has been long established that such conduct affords a proper basis for an action against the union and against the employer who joins in the discrimination.[3] Since Wells' discharge resulted from these discriminatory practices by the union and the company, it is likewise not entitled to be sustained in the present proceeding.

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Neutral Referee's Opinion

Finally, Wells contends that even if the above position is not sustained the discharge should not be permitted to stand because of the disparate treatment accorded him and some ALPA pilots who committed acts of negligence and yet were not discharged.

Reduced to essentials, the issue here is whether the aggrieved was discharged for lack of qualification, as the Carrier maintains, or as a result of hostile discrimination by ALPA, as Wells contends.

It is appropriate to note, in light of the charge of bias and prejudice against the System Board members, other than the Neutral Referee, and the charge of hostile discrimination by ALPA and members of management, that the decision in this case has been arrived at by the Neutral Referee alone without consultation with any other member of the Board. Under the parties' System Board Agreement, if two or more members concur in the Referee's decision it then becomes a final and conclusive determination.

This Referee and others have had occasion in prior cases to comment on the difference in degree of proof required to sustain a discharge of an airline pilot and employees in most other industries. In other than air pilot cases, it is generally recognized that the burden of establishing proper cause for discharge is on the employer and if he fails to do this by clear and convincing evidence, the discharge will not be allowed to stand. However, a lesser degree of proof is generally required to sustain the release of an airline pilot from duty for lack of qualification. That of course results from the fact that an air carrier is under a strict legal obligation to afford protection to the public in all matters against which human providence and foresight might guard and is under obligation to exercise the highest degree of practical care and diligence in flight operation. Indeed, its responsibility extends not only to ex-

ercise of care in the selection and use of equipment and facilities but to the selection and retention of personnel to perform the flight service. In this kind of case, a management decision that a pilot is unqualified, if made honestly and in the interest of public safety, is not to be lightly disturbed. For while to be sure, a pilot is entitled to protection from hostile discrimination and unjust treatment, the interest of the public in safe air travel is paramount and, unless the evidence is so clear and convincing as to lead a reasonably minded person to conclude that reinstatement would involve no future risk to passengers and to public safety, reinstatement may not be ordered.

We turn to a consideration of the specific charges and evidence in this case.

1. *Taking off over gross weight at Tallahasse.* In the evening on January 28, 1969, Wells was scheduled to fly as captain on a charter flight from Tallahassee, Florida to Columbia, South Carolina. It was necessary to refuel before departing and he ordered 850 gallons gasoline and 22 gallons oil to be added. On a charter operation it is the flight crew's responsibility to determine the proper fuel load. In actual fact, the gasoline ordered exceeded the amount required by 350 gallons, the airplane being certificated for a maximum weight of 44,900 pounds. As a result, the airplane, a Martin 404, took off weighing 47,000 pounds, or about 2,500 pounds overweight. The certified maximum weight is calculated to permit an airplane to take off in the event of loss of an engine on takeoff and, once airborne, to sustain level flight with an engine out. In this instance, according to Southern's V. P.-Flight Operations, had Wells lost an engine on takeoff after reaching V_1 speed "he would have crashed at the end of the runway." (Tr. Vol. I p. 26) Further, according to the same witness, had Wells lost an engine enroute after takeoff, he would not have been able to maintain altitude.

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Neutral Referee's Opinion

Wells admitted that it was his responsibility to see that the proper amount of fuel was on board. He claims he actually ordered the gas to be brought up to 850 pounds "but they put on 850 instead of bringing it up to 850." For some unknown reason, he did not determine from either the aircraft log, which he was supposed to execute before takeoff, or from the gauges, which he was supposed to observe during the reading of the cockpit checklist, that he was overweight. An overweight aircraft handles sluggish during takeoff and Wells became aware for the first time of the overweight condition on takeoff when he noticed the airplane was heavy on the "climb out." This was about five minutes after he was in the air and, he claimed, inasmuch as fog was setting in at Tallahassee he "didn't want to turn back and hold in that vicinity." Enroute to Columbia he called Dispatch and was told to "run rich and hold over" Columbia until he got down to landing weight. After holding 40 minutes over Columbia and getting the aircraft down to 43,000 pounds, he landed.

From the evidence in this case, there can hardly be a reasonable doubt that Wells' failure to observe the numerous safeguards which existed for avoidance of a fuel overload and his actual taking off from Tallahassee overweight about 2,500 pounds was gross and inexcusable carelessness. Further, there is credible expert testimony which persuades me that he exercised faulty judgment in leaving the Tallahassee area and continuing to fly cross-country at night after he became aware that the aircraft was overweight. According to Southern's V. P.-Flight Operations, what Wells should have done was circle the Tallahassee airport and burn off the fuel until he got to his dispatch weight and then proceed to Columbia under normal flight plan. In that case, he would have been close enough to the

airport so that if he lost an engine he could have maneuvered in for a landing. The V. P.-Flight Operations testified: (Tr. Vol. I pp. 77-80).

> Q. Let me ask you this: What if that plane became airborne as it did and, at that point, the overload of fuel is discovered and there is also a fog setting in. Would you say, under those circumstances, that the plane ought to remain around Tallahassee in that fog? A. The pilot has to weigh this under the circumstances at the time. With the facilities that Tallahassee has for landing, yes, I'd take my chances on landing in the fog. * * *
>
> Q. And you can conceive of conditions of weather at the point where the plane is located, such as Tallahassee, that would make it a matter of good judgment to proceed on and go to the destination, can you not? A. Not overloaded, no, sir.
>
> Q. Do I understand you correctly, that you cannot conceive of any conditions of weather around Tallahassee that would make it advisable to proceed on to Columbia, the destination, rather than to stay in the weather in Tallahassee? A. No, sir, not at night; I'd stay there.
>
> Q. Regardless of weather conditions? A. Yes, sir.
>
> Arb. Platt: Regardless of the weather, the judgment that should be made by the pilot would be the one which you would make, is to land, rather than go on.
>
> The Witness: I wouldn't say I would land. I would stay in the area. Then, in case I lost an engine, then I would have some place to land.
>
> Arb. Platt: Would you go so far as to say that some other pilot who did not make the same judgment was wrong?

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Neutral Referee's Opinion

The Witness: I obviously felt that way about this, yes, sir.

Mr. Pate: I didn't understand that answer.

Arb. Platt: He said he obviously felt that way about this, meaning by that his answer to my question was "yes." He would feel that a pilot who made the opposite decision and was to go on was wrong.

Q. Do you know whether there was fog in Tallahassee on this occasion? A. I don't know; no, sir.

Q. Did you know at the time that Mr. Wells was discharged whether or not there was fog in that area? A. I didn't have the weather report on it; no, sir.

Q. Did you try to find out what the weather condition was? A. Well, it was my conclusion, without looking at the weather, that if it was good enough to take off, it would be good enough to land.

Q. So, the condition of the weather would not affect, in any way, your appraisal of that situation down there? A. No, sir; it did not.

Q. And if, in fact, the fog was setting in and he went on from the Tallahassee area for that reason, you would still find grounds to criticize his handling of that situation? A. Yes, sir.

2. *Unsatisfactory January 31 line check.* On January 31, 1969, two days after the Tallahassee incident, Wells was scheduled to fly to New Orleans with Carey Allen as co-pilot. On learning that Wells was to be the captain, Allen told Chief Pilot Brown he would not fly with Wells except under written protest. This was unsatisfactory to Brown who decided he would take the flight himself and give Wells a line check.

Neutral Referee's Opinion

Chief Pilot Brown evaluated the line check as unsatisfactory. Specifically, he found Wells' *ground handling* of the plane rough—"every turn he made, he would overcontrol on the steerable nosewheel*** there was no particular reason for him to do it but it was obvious to me that he had developed the habit of handling the airplane this way." Then, he found that on *takeoff*, Wells ignored published procedures and did them in such a way that "it could have gotten him in serious trouble." Among other things, when the wheels were about 50 feet off the ground, Wells insisted on turning off the ADI and losing the benefit of 700 horsepower which is necessary to have under heavy load conditions. Also, as soon as he called gear up, he turned off the auto-feather and turned on a ventillating fan, thus adding an additional hazard and flying in violation of Federal Air Regulations, which require all takeoffs to be made with the auto-feather operative. On the *cruise* part of the flight, where the procedures call for leaning the engine within three minutes of attaining assigned altitude, Wells leaned the engine "in fifteen seconds and the next time he wouldn't lean it one minute the entire leg, thirty-minute leg, and this kind of thing. Completely inconsistent. He seemed to have no—he just didn't comprehend the purpose of leaning the mixtures, whatsoever." On the *use of radios*, the Chief Pilot noted that Wells did not comprehend all messages, such as approach information and "on numerous occasions he did not receive the clearance as it was written, he did not conform to the clearance, primarily because it became obvious to me that he didn't understand the clearance as given." In testing for *approach and landing*, the Chief Pilot noted two unsatisfactory ILS approaches, one at Birmingham, Alabama, and one at Meridian, Mississippi. At Birmingham, he said, the weather was given to them as scattered clouds at 300 feet, broken

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clouds at 600 feet, visibility one mile with light rain, fog and smoke. They were vectored onto a downwind leg at 3000 MSL and advised 2½ miles southwest the outer marker that they were cleared for an ILS approach to land straight in on runway 5. He testified: (TR. Vol. II pp. 169-181)

> When you get within three to five miles of this primary fix, this outer marker, you're suppose to get your airplane set up and all your check lists run and ready to tie this ILS down and land. slow your airplane down, get it down to the proper speed.
>
> Well, we were cleared from three thousand feet MSL down to twenty-two hundred, which is a crossing altitude, and he starts to let down, but he does it in such a manner that he doesn't drop the landing gear, he doesn't put down any flaps at all to slow the airplane down. So, we come across the outer marker, when we should come across the outer marker at a hundred and twenty knots, we come across the outer marker at exactly a hundred and forty knots.
>
> Q. Should the landing gear be down and should you be using the flaps at that point? A. Yes, sir. The landing gear should be down prior to the time that you get to the outer marker and you should have the airplane set up in landing configuration and you should have the landing gear down and extended and check your green lights and all these check lists, to see that it's in a safe condition.
>
> Q. Had he completed the check lists? A. No, sir, we hadn't completed the check list at the time we got to the outer marker. We completed it right at the outer marker. He dropped the gear right at, just about the outer marker. • • •

Neutral Referee's Opinion

So, here we were over the outer marker with improper flap setting and a hundred and forty knots, instead of a hundred and twenty and virtually no wind. They were reporting the wind as five knots, which is considered a calm wind. If it had a real strong wind on the nose, that would have helped slow us down. But we continued down in this fashion, fast and high. And he should have already had down the second portion of the flaps, which is called "approach flaps", but we didn't get these approach flaps down until much later, when we were about two miles from the airport, because we had too much speed. We had a hundred and forty knots and you can't extend your flaps to approach speed above a hundred and thirty knots, because of the structural design of the airplane.

So, the danger part of it is: Here you're coming into Birmingham, Alabama on the instruments. We were in the clouds at this time. • • •

But here we come down the ILS, into this hole of Birmingham, where there's a runway down there and the ILS glide slope needle was pegged out all the way up to the top and it stayed there. And he seemed at a complete loss as to what to do to get it back down. • • •

The clouds were six hundred feet above the ground and we are only required to have two hundred feet clouds, two hundred feet above the ground on this approach.

Q. And two miles visibility? A. Two miles visibility. That means your forward visibility has to be at least two miles, so you can at least see the other end of the runway.

Neutral Referee's Opinion

In addition to his being high and fast, he's making corrections back and forth this way, from a heading of almost north ten degrees, back and forth, trying to tie down his localizer.

Now, we continue in this attitude, never tying down either the localizer nor the glide slope, until we're coming down and, at about twelve hundred and fifty MSL, which is six hundred feet above the ground—* * *

So, just about—oh, aproximately a mile from the end of the runway, we break underneath the clouds and here's the airport sitting over here to the left. We get in there okay, but we weren't where we were suposed to be. We weren't in the position where we should have been. * * *

And if he had done what was proper and what the passengers back there would have like for him to do,* * * he would have executed a missed approach and gone around. But, instead, he pulls all the power off the airplane and he calls for landing flaps and he is still going a hundred and thirty knots. * * *

Q. What's the maximum speed at which you can —you're supposed to use landing flaps? A. A hundred and five knots, and he was at one thirty when he called for them. Whether he knew he was at a hundred and thirty or a hundred and five, I haven't determined, but he called for landing flaps and I didn't give it to him. * * *

So, he dives the airplane down and he gets it down in this hole in Birmingham and the runway was wet. It had been raining all over the South-east. And he touches down just about midway down the airport, which leaves us another five thousand feet of runway to land. There was never any doubt in

my mind we could get the airplane on the ground and stop. But when we get on the ground he made a fairly decent landing, because it's pretty easy to land on, to make a touch-down smoothly on a wet runway. It's after you get on the ground on a wet runway that you have — Just as soon as he touched down, he called, "Lock the controls" and I couldn't believe it. • • •

He would have had real trouble controlling the airplane if I had locked the controls when he called for it. • • •

Q. Is there a logical reason for him to call for locking the wheels at that point? A. No, sir. There's no reason, whatsoever, and it just indicated to me that he had in his mind that somewhere in his procedure the controls were supposed to be locked and he thought this was about as good a time as any to lock the controls and get that done and that's what he did. That's what he called for.

So, what he should have done would be just real —make it real simple. He should have touched down on that wet runway and eased forward on that yoke and gotten the airplane in the position where he could use the available reverse trust. • • • Instead he didn't touch the reverse throttles at all. • • •

We broke contact at six hundred feet above the ground, when we should have been about two to three hundred feet above the ground that close to the airport. So, we're sitting up here real high and the airport is down here, and thank goodness there was a ten-thousand-feet runway. If there hadn't been, we couldn't have, in any way, dived the airplane down and got it on. You're not supposed to dive the Martin, anyway.

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Neutral Referee's Opinion

Chief Pilot Brown found a similar lack of technique in Wells' Meridian approach. He reported it as follows:

> Approach Control advised us of our radar position as being 25 miles northeast of Key Field and to "expect a vector to an ILS approach to runway "one" with a circle to land on runway "one-nine" (19).
>
> The weather was given to us at that time as "ceiling measured five hundred overcast, visibility five miles with fog, wind from 170 degrees at eleven knots". Wells had been reviewing the MEI ILS approach plate but he did not realize that Key Field was below circling minimums and the wind was beyond limits for a landing straight-in on runway "one". He started his descent upon intercepting the inbound localizer course but he remained "two dots" to the left of center line all the way down with no real effort to correct to the center line. I reported to the tower as we passed the OM inbound and, luckily, the tower reported the surface wind as having decreased to 170 degrees at seven (7) knots. Wells told me to advise the tower that we would plan to land straight-in on runway one. We broke contact at 800 feet MSL (500 feet) but at least 200 feet to the left of the runway.

In summary, Chief Pilot Brown found that Wells' line check showed he did not adhere to normal operating procedures. He concluded the line check was unsatisfactory "based primarily on two unsatisfactory ILS approaches."

3. *Failure to pass a proficiency check on February 4th.* As a result of the Tallahassee incident and the unsatisfac-

tory January 31 line check, Wells was given a special proficiency check by V. P.-Flight Operations Grubb. Grubb graded the check unsatisfactory because he found Wells' "proficiency well below minimum", his headwork "very unreliable", and his judgment "erratic". Specifically, he found Wells' performance unsatisfactory on takeoffs, which Wells twice aborted when an engine was cut off. The purpose of this maneuver was to check his ability to maintain directional control and fly the airplane off the ground on one engine. On a third attempt, he completed the takeoff but, according to Grubb, when the engine was cut Wells "immediately yanked the controls back and got us off the ground before we had reached safe flying speed, which caused us to lose directional control and the airplane was heading for a crash, actually. I had to bring the power back in to straighten it out . . . restore the engine that I had cut in order to recover from the accident that was immediately ahead." His performance on *approach to stalls* was also unsatisfactory primarily because of mechanical execution, rough handling, and general lack of technique. On *approach procedures*, he was rated unsatisfactory because he did not adhere to proper speeds and his approach was so far off that there was full deflection of both the course and glide slope. Finally, he was rated unsatisfactory in the degree of *judgment* exercised because, according to Grubb, "he didn't follow proper procedures. His judgment and decision-making functions were not normal."

4. *Complete record as a pilot with Southern Airways.* In addition to receiving a disciplinary penalty for ignoring a fire warning during a flight from Columbus to Atlanta, Georgia in 1962 and a reprimand for engaging in an altercation with another pilot while on duty in 1965, Wells failed two checks and had marginal passes on others. Cap-

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tain Andrew N. Ernst, a former FAA Inspector and present Assistant Chief Pilot for Southern, testified that he was an FAA observer on a co-pilot proficiency check given to Wells in 1963, when his "main problem was failing to accomplish procedures, particularly emergency procedures, in proper order. This was engine failures, engine fires. In other words, the procedures, knowledge of procedures was poor." In December, 1965, when he was Assistant Chief Pilot, Ernst gave Wells a check ride which was unsatisfactory "primarily due to the knowledge of the equipment. He did not know the equipment, the systems operation and emergency procedures. The flight portion was barely satisfactory . . . he was hazy on his procedures, in-flight procedures. He was rough on the controls and he went below the glide slope on precision approaches." As a result, Wells was sent back to ground school for a refresher training on procedures. On March 19, 1968 Wells was rated unsatisfactory on another flight check given by Captain Ernst. Ernst testified concerning it as follows: (Tr. Vol. pp. 9-13)

> A. The initial thing that was unsatisfactory was: One of the required maneuvers is simulated engine failure immediately after lift-off and this is a very precise, exacting maneuver and must be done well or you lose your airplane.* * *
>
> Mr. Wells allowed the airplane to drift thirty degrees off the runway heading, which, if you had an obstruction out there, you hit it. He didn't maintain a proper air speed to get the performance out of the aircraft. * * * the air speed could be properly referred to as V-2 that you maintain to at least four hundred feet or minimum structures.* * * He had a higher air speed at one point and then, he pulled the nose up

abruptly and got below V-2. In other words, his air speed control was erratic and he didn't execute the proper procedures as far as assuring that the engine had—the propeller had feathered and he didn't have a fire, and so forth.* * * Well, we proceeded, then, to Macon, to start shooting ILS approaches. * * * the first one, if I recall correctly, we should have been slowed down to a hundred and twenty knots and had our landing check list completed prior to the initial point where you start your descent, and we came up to the outer marker at about forty knots fast and then abruptly pulled the power almost completely off and pulled the nose up to slow the airplane down and then, the gear and the flaps were extended and the power wasn't put back on. As a result, the air speed dissipated down to about ten knots below a safe air speed. And then, we were below the glide slope and, at minimums, he failed to turn over the marker beacon, so we didn't hear the marker beacon. * * * Mr. Wells did not turn on the marker beacon receiver.

Q. So he could not receive the signal to go around; is that correct? A. That's right. And, at the same time, you still have your altimeters to tell you that you are below your safe altitude. He didn't recognize that, either, and went below, and when he finally started to execute his missed approach,—the initial air speed is a hundred and eleven knots and my recollection on—he did this two or three time improperly, but at one point, he had the airplane at a bank and the air speed was ninety-five knots and I had to roll the airplane out because it was too low and too dangerous. * * * Now, this

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general thing happened several times. I don't know whether we tried that approach three or four times, but he never was satisfactory and I discontinued his check ride because I saw that he should have some more training and I took another student.

The next day we went back down to Macon and tried to run the check again and essentially the same thing happened. His procedures, he was still hazy on them. He couldn't execute an ILS properly.

(Adverse testimony was also given by two co-pilots who flew with Wells at infrequent times in 1968. However, I was not impressed with their testimony and therefore gave it no weight.)

After careful study of the entire record, I am unable to find any clear and convincing refutation of the check results discussed above or of the conclusions reached by those who conducted those checks. For one thing, I find no substantial rebuttal of Captain Ernst's adverse testimony concerning Wells' 1965 and 1968 failed checks. Nor was there more than a casual statement by Wells of the circumstances of the Brown and Grubb checks. Wells did refer in his testimony to the two landing approaches which Brown found unsatisfactory. At Birmingham, he said, an overriding wind took the airplane out of position at the outer marker and he made a right turn into the wind in order to get it "tied down." He acknowledged that he made a bad ILS approach and consequently "was high and fast" on his speed and altitude.

At Meridian, he testified, with a seven knot wind reported, he decided to make an ILS straight-in approach but the conversation that was going on between Brown and the control tower diverted his attention so that he "didn't catch it in time" and got a little off the runway to the left.

Regarding the proficiency check he was given a few days later by Captain Grubb, Wells conceded that on his third attempted take off the plane was in a semi-stall and in trying to keep it from stalling he was diverted off the approach line and forgot several procedures he should have run through.

Based on all the evidence and the record, considered as a whole, the conclusion is for me inescapable that Wells' judgment and performance as a pilot were substandard and that that was the cause for his discharge. A pilot entrusted with the lives of numerous passengers may surely be expected to attain and maintain a reasonable degree of proficiency and to exhibit competence in his flying, demonstrate sound judgment and utilize equipment to the safe and successful completion of his flight. What is not expected of such a pilot are displays of periodic deficiencies in judgment, repeated lack of knowledge, and continued marginal or substandard proficiency. Wells' record shows not only a tendency to deviate from standard flight procedures but a lack of knowledge of those procedures.

The foregoing conclusion does not, however, completely resolve the issue. For while it is true, as Company counsel suggests, that the central issue is Wells' lack of ability as a pilot, it is not the sole question. Another is whether the discharge was in fact due to his lack of competence and not to discrimination, caprice or arbitrariness. In this case, the aggrieved's heavy reliance has indeed been on the premise that his discharge was brought about by the hostile attitude of ALPA and its members and through their collusion with members of management sympathetic to ALPA.

After a rigorous examination of all the evidence, I must say that I find nothing in the record to support the charge that the aggrieved's termination was the result of hostile discrimination by ALPA or its members and nothng

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support the charge that ALPA members and members of Management conspired to bring about his discharge. Assumption is no substitute for reasonable probability as a measure of wrongdoing. Wells indeed makes much of the fact that there was a pilot strike at Southern in 1960-1962 during which he and other non-union pilots displaced ALPA members and which, he asserts, stirred great resentments and caused strong feelings of animosity to develop among the striking and non-striking pilots. Undoubtedly, in a situation like that, resentments and animosities do develop. And there is not much question that in this case they spilled over from the strike and affected pilot relations for a time after the strike. But the passage of time has healed most of the old wounds and no one, except the aggrieved, seems seriously to believe that the relations between ALPA members and non-ALPA members have been so poor in recent years as to make a conspiracy to bring about Wells' discharge a reasonable probability. In fact, a witness for the aggrieved, who was himself hired during the strike and who now heads the Southern Pilots Association, a non-union group, stated he was quite pleased with the relationship between ALPA and non-ALPA members. He testified: (Tr. Vol. III pp. 107-108)

> Q. Would it be your judgment that the feelings had subsided substantially since the strike?
>
> A. I think nothing short of a miracle could have brought the relationship to where it is today, considering all the things that have happened.
>
> Q. In other words, you are presently—you are pleased with the progress that's been made between the two groups, considering the feeling that existed during the strike.
>
> A. I'm not satisfied with it, but I'm pleased with it, I mean, it could be better. Is any man satisfied, well hardly, with anything, until it reaches perfec-

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> tion? But we have demonstrated for a period of four years, and non-union pilots in supervisory capacity ran the Company and, now then, for almost two years, union pilots in a supervisory capacity have been in the driver's seat.
>
> But the great thing that has come out of this thing, I think, was we started out as captains here, we were demoted back to co-pilots, and we sat with our jaws locked and our tongue in our cheek and said, "Well, I hope this guy knows how to fly." Well, he was probably thinking the same thing for two years, while he was out there on strike, because he felt it was his airplane, I guess. But, at any rate, we learned to respect that and, as time went along and things happened, they learned to respect us, in their way. I mean, there's times when things happen that it takes two people and when those times came up, it was never found lacking, that I know, that a union and non-union pilot failed to make it.

Nor do I find support in the record for the contention that there was disparate treatment of ALPA members and non-ALPA members in disciplinary matters. Since 1962 four pilots have been discharged by Southern. All four were ALPA members. No non-ALPA pilots have been discharged. There was no proof that any ALPA pilot deserved discharge but was not discharged.

Further discussion would unduly prolong this Opinion and serve no useful purpose. Suffice it to say, that after painstaking study of all the evidence, I am constrained to conclude that the aggrieved's discharge was for proper cause and not arbitrary or discriminatory.

January 7, 1970

/s/ HARRY H. PLATT
Harry H. Platt, Neutral Referee

BLEED THROUGH

SOUTHERN AIRWAYS INC. SYSTEM BOARD OF ADJUSTMENT

IN THE MATTER OF

THE DISCHARGE OF RALPH WELLS

—o—

AWARD OF SYSTEM BOARD OF ADJUSTMENT

The discharge of Ralph Wells on February 5, 1969 was for proper cause. His grievance is accordingly denied.

/s/ HARRY H. PLATT
Harry H. Platt,
Neutral Referee

/s/ GEORGE M. GROSS
Yancy Sims — George M. Gross

/s/ W. C. LITTY
James Bass — W. C. Litty

ALPA Members — Carrier Members

January 16, 1970

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IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 13647

RALPH WELLS,

Plaintiff,

v.

SOUTHERN AIRWAYS, INC., and AIRLINE PILOTS ASSOCIATION INTERNATIONAL,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. The plaintiff, Ralph Wells, was an airline pilot in the employ of the defendant carrier, Southern Airways, Inc., before his discharge on February 4, 1969.

2. Plaintiff was initially employed by the carrier as a captain in June 1960 at a time when the defendant union was conducting a pilots' strike against the carrier. He was a strikebreaker, and, in the more colorful language of American industrial relations, a "scab." (Joint Exhibit 1).

3. Plaintiff continued in the employ of the defendant carrier for the duration of the lengthy strike as a captain, but when the strike ended in September 1962, the striking pilots were reinstated with seniority and therefore plaintiff, by reason of having less seniority, became a co-pilot. He subsequently attained the posititon of reserve captain, which position he held at time of discharge.

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4. Plaintiff never became a member of the defendant union while employed by the defendant carrier.

5. Plaintiff was discharged by W. Bayne Grubb, defendant carrier's vice president of flight operations, in part upon a discharge recommendation of R. T. Brown, the defendant carrier's chief pilot.

6. Prior to the circumstances surrounding and immediately preceding his discharge, plaintiff's flying record with the carrier had been satisfactory. He regularly received the periodic checks that were required by federal regulations and company practice. In the few instances when any of these checks were not satisfactory, the deficiencies were promptly corrected.

7. Plaintiff had received such periodic checks in September and November, 1968, and had been found to be fully qualified to operate aircraft as captain, and he was not due to receive another check until March of 1969.

8. However, as the result of two highly unusual complaints by union members (Joint Exhibit 1), solicited by the chief pilot, a union member, who, before his promotion to chief pilot, had participated in the pilots' strike and had been a leader and spokesman for the striking pilots, the chief pilot gave plaintiff an out-of-town check which he found unsatisfactory, and recommended plaintiff's discharge. At about the same time, plaintiff made a take-off overloaded with gas. Plaintiff was given another check by a company official, and discharged.

9. In accordance with the contract between the carrier and union, plaintiff referred his complaint concerning his discharge to a five-member system board of adjustment.

10. The union contract provided that such a board of adjustment should be composed of two members selected by the carrier, two members selected by the union, and a fifth member selected by the other four.

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11. The carrier selected as members of the system board George M. Gross, its vice president and general manager, and W. C. Litty, administrative assistant to the officer who had discharged plaintiff. Litty, then a pilot, had been a participant in the strike conducted by the union against the carrier in 1960-1962, and was a member of the union.

12. The union selected as members of the system board James Bass and Yancey Sims. Both were members of the union and had been active participants in the pilots' strike of 1960-1962.

13. At the beginning of the hearing before the system board of adjustment, plaintiff made timely objection to the composition of the board, asserting that he intended to show his discharge resulted from union hostility to him resulting from his strike-breaker status in 1960-1962—and the acquiescence of the carrier in the union's efforts to get rid of plaintiff since, following the termination of the strike, the carrier had to get along with the union.

14. The system board did not rule upon the objection to its composition, but the hearing proceeded with a stipulation that plaintiff was not waiving his objections. All five members sat on the board during the hearing and participated in the proceeding. The parties, the union and the carrier, refused even to entertain the extremely modest suggestion by counsel for plaintiff that the union and the company could appoint as their designated members of the board persons who had not taken an active part in the strike and who might reasonably be expected to have less pronounced feelings with respect to strikebreakers. This adamant attitude contrasts sharply with defendants' present contention that the carrier and union designees were merely dummies. This Court does not credit that testimony, which was equivocal in any event. The Court finds that the actions of the carrier and union designees were clearly directed to advising the neutral of their position in the matter.

15. The board, by decision signed by the neutral and two carrier members—but not signed by the union members —upheld plaintiff's discharge.

16. In the present action, plaintiff asks this Court to review and set aside the award of the system board of adjustment and to order his reinstatement with back pay, and to award costs of litigation, including attorneys' fees and punitive damages, against both defendants. In the alternative, plaintiff asks the Court to award him as against both defendants compensatory damages based on his past and future loss of earnings, loss of retirement benefits, and costs of litigation, including attorneys' fees. As a further alternative, plaintiff asks the Court to order a new hearing and redetermination of his complaint by a system board composed only of impartial members, that he be awarded back pay to the time of such hearing, together with costs of litigation including attorneys' fees, and that he be granted an award of punitive damages against both parties, or if not granted against both parties, against the defendant union.

17. It is contemplated in five-man system boards of adjustment in the airline industry that the two carrier-designated members will be partisan for the carrier's interests; that the two union designees will be partisan for the union's interests. Where the grievant is a good union member this system will work well; when grievant is *persona non grata* to the union, the system breaks down[1] because the two labor members of the board are selected by the union not the grievant, and the four industry members —not the grievant—select the neutral. Thus in the airline industry professional arbitrators or neutrals, are dependent upon the relative good graces of the companies and unions for continuing employment opportunities. They

[1] See *Andrews v. L&N R.*, 406 U.S. 320, 334 (n. 7).

have no relationship to, or hope for employment from, individual grievants who may not be union members.

18. While, in view of its present piecemeal disposition of this case, the Court will not make detailed findings thereon, the Court does find that plaintiff had more than adequate basis for claiming an institutional hostility toward him by the union. The record clearly reveals a shocking attempt by the union to drum plaintiff out of the company, finally acquiesced in by the company's management. For example, on three successive flights in 1965, a union captain placed a crash ax in his lap and threatened plaintiff, then his co-pilot, concerning its use. (It is interesting to note that the company took no disciplinary action whatever against that union captain although no one would dispute that his actions were far more worthy of immediate discharge for the sake of public safety than those for which plaintiff ostensibly was discharged.) The union members' failure to sign the report as to plaintiff's grievance is illuminative. If they had signed, they would have created a precedent supporting discharge for overloaded take-offs —if they dissented, they would be supporting a strike-breaker. Inaction was their solution to the dilemma. It is sufficient to say the record demonstrates factually a continuing, virulent hostility by numerous union members, collectively constituting the union, towards plaintiff. The Court finds that there was a deep-seated union institutional hostility toward plaintiff at the time of the hearing which dictated and permeated the union's actions with respect thereto. Otherwise, the discharge probably could not have been effectuated. (See p. 95, Vol. 1, Arbitration Hearings.)

B. Conclusions of Law

1. This Court has jurisdiction to review and set aside the award of the system board of adjustment, and of plaintiff's claim against the defendant carrier and

defendant union for wrongful discharge and unfair representation.

2. The system board of adjustment which heard and decided plantiff's grievance was not properly constituted in that the two union members were selected by the union, not the grievant, and were acting in the interests of the union which had a strong institutional bias against plaintiff, and contrary to the interest of the plaintiff. Such attitude could not help but be observed and felt by the neutral, who would be aware that a decision unfavorable to grievant was desired by both company and union. While the Court does not question the integrity of the neutral in this instance, clearly a person of stature and highly regarded, nevertheless the rights of a grievant should not depend upon whether or not the neutral's character contains sufficient fortitude to withstand the potentialities for a biased ruling here presented.

3. Because of this element of lack of fairness or industrial due process, the award of the system board is set aside, and the cause remanded for consideration by a fairly reconstituted system board, or other arbitrational tribunal, in further proceedings in which the interests of plaintiff are fairly represented. The parties shall, within 30 days, confer and submit to the Court promptly thereafter their proposals for implementing this direction.

4. The Court retains complete jurisdiction of this matter except insofar as necessary to accomplish the remand hereinabove directed, but defers further decision at this time pending the arbitration hereinabove directed.

5. The parties shall report to the Court with respect to the results of the arbitration required.

So Ordered, this 20 day of September, 1974.

/s/ Charles A. Moye, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 74-3706

SUMMARY CALENDAR*

Aug. 11, 1975.

RALPH WELLS,

Plaintiff-Appellee,

v.

SOUTHERN AIRWAYS, INC., and THE AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

Before:

THORNBERRY, SIMPSON and RONEY, *Circuit Judges.*

Per Curiam:

On February 5, 1969 Southern Airways terminated Ralph Wells, a pilot with nine years of service. Pursuant to the collective bargaining agreement between Southern and the Air Line Pilots Association (ALPA), Wells received a written statement of the reasons for his termina-

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

tion.[1] He elected to challenge his discharge through the grievance procedure provided in that agreement.[2] The five man System Board found that Southern's action was justified because of the past incidents of pilot incompetence and the substantial public interest in safe air travel. On April 6, 1970 Wells challenged the System Board determination in district court. The court upheld Wells' claim that the System Board procedure denied him due process, and ordered another hearing. We reverse.[3]

The district court's power to set aside the System Board determination is very limited. The Board's decision on the merits is final, and not subject to review. Gunther v. San Diego & Arizona Eastern Ry. Co., 382 U.S. 257, 86 S.Ct. 368, 15 L.Ed.2d 308 (1965); Hall v. Eastern Air Lines, Inc., No. 74-3883, 511 F.2d 663 (5th Cir. 1975); Giordano v. Modern Air Transport/IBT System Bd. of Adjustment, 504 F.2d 882 (5th Cir. 1974). A federal court does have power to set aside the Board's determination where there is an absence of fundamental due process. Hall v. Eastern Air

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[1] Southern's notification of termination gave four reasons: (1) taking off over allowable gross weight from Tallahassee, Florida on January 28, 1969; (2) failing a line check on January 31, 1969; (3) failing a proficiency check ride on February 4, 1969; and (4) an unsatisfactory overall record as a Southern pilot.

[2] Wells elected not to bring his grievance before a four man System Board, consisting of two members designated by the carrier and two by the union. He proceeded directly to a hearing before a five man board—essentially the four man board plus a neutral arbitrator. Section 31(a)(7) of the collective bargaining agreement granted him this option.

[3] The district judge ordered a new hearing before an impartially constituted System Board on Wells' discharge. Wells here questions the appealability of that order. We find that the district court's order was a final judgment within the meaning of 28 U.S.C. § 1291. Hall v. Eastern Air Lines, No. 74-3883, 511 F.2d 663 (5th Cir. 1975); Ringsby Truck Lines, Inc. v. United States, 490 F.2d 620 (10th Cir. 1973); Cohen v. Perales, 412 F.2d 44 (5th Cir. 1969), *rev'd on other grounds sub nom.* Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 14-20, 28 L.Ed.2d 842 (1971).

Lines, Inc., *supra;* Rosen v. Eastern Air Lines, 400 F.2d 462 (5th Cir. 1968), *cert. denied,* 394 U.S. 959, 89 S.Ct. 1307, 22 L.Ed.2d 560 (1969). But that narrow exception does not apply in this case.

Wells claimed his discharge resulted from an ALPA policy of discrimination against nonunion pilots, and management-union collusion in furtherance of that policy. The neutral arbitrator specifically commented on that charge of his decision.[4]

> After a rigorous examination of all the evidence, I must say that I find nothing in the record to support the charge that the aggrieved's termination was the result of hostile discrimination by ALPA or its members and nothing to support the charge that ALPA members and members of Management conspired to bring about his discharge. Assumption is no substitute for reasonable probability as a measure of wrongdoing. Wells indeed makes much of the fact that there was a pilot strike at Southern in 1960-1962 during which he and other non-union pilots displaced ALPA members and which he asserts, stirred great resentments and caused strong feelings of animosity to develop among the striking and non-striking pilots. Undoubtedly, in a situation like that, resentments and animosities do develop. And there is not much question that in this case they spilled over from the strike and affected pilot relations for a time after the strike. But the passage of time has healed most of the old wounds and no one except the

[4] The neutral arbitrator, conforming to standard System Board practice, wrote his decision without consultation with the other four members of the Board. The two company designated members signed the opinion, but the two union designated members returned the opinion to the neutral unsigned.

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aggrieved, seems seriously to believe that the relations between ALPA members and non-ALPA members have been so poor in recent years as to make a conspiracy to bring about Wells' discharge a reasonable probability.

Wells received a full hearing before the Board. He had full opportunity to present his claim that he was not discharged for incompetence, but for hostile discrimination against nonunion pilots by the ALPA, and company acquiescence in that discrimination. The Board resolved this claim adversely to Wells.

The collective bargaining agreement provides for a five man System Board composed of two company-designated representatives, two union-designated representatives, and a neutral arbitrator. All five are charged with the responsibility of impartially deciding the case before the Board.[5] The trial court did not find any bias on the part of individual members of the Board. No denial of fundamental due process occurred, making the Board's decision final. The district court exceeded its authority when it set aside the Board's determination. *See* Giordano v. Modern Air Transport/IBT System Bd. of Adjustment, 504 F.2d 882 (5th Cir. 1974).

Reversed.

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[5] The district court may have misunderstood the role of the management and labor members of the Board. In Finding of Fact 17, the court stated: "It is contemplated in five-man system boards of adjustment in the airline industry that the two carrier-designated members will be partisan for the carrier's interests; that the two union designees will be partisan for the union's interests." But, as stated above, all five are charged with the duty of impartially deciding the case.

The union, as the bargaining representative for *all* employees of Southern, has a duty to fairly represent Wells. Under the collective bargaining agreement, the union was obligated to provide representation for Wells at the grievance hearing. Instead Wells exercised his option to retain his own counsel.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-3706
Summary Calendar

D. C. Docket No. CA-13647

RALPH WELLS,

Plaintiff-Appellee,

v.

SOUTHERN AIRWAYS, INC., and THE AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

Before:

THORNBERRY, SIMPSON and RONEY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that costs are to be taxed one-third against plaintiff-appellee, Ralph Wells, one-third against defendant-appellant, Southern Airways, and one-third against defendant-appellant, Airline Pilots Association, International.

August 11, 1975

Issued as Mandate:

BLEED THROUGH

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 74-3706

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Nov. 6, 1975

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RALPH WELLS,

Plaintiff-Appellee,

v.

SOUTHERN AIRWAYS, INC., and AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendants-Appellants.

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

———o———

Before:

THORNBERRY, SIMPSON and RONEY, *Circuit Judges.*

PER CURIAM:

Subject to the following, the Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

On Petition for Rehearing

Plaintiff-appellee Wells urges in his petition for rehearing that this Court's reversal of the district court without providing for remand denied him the opportunity to present his claim against the union for breach of the duty of fair representation. Under the rule of *Czosek* v. *O'Mara*, 1970, 397 U.S. 25, 90 S.Ct. 770, 773, 25 L.Ed.2d 21, a claim for breach of the duty of fair representation is separate and distinct from plaintiff-appellee Wells' claim that the System Board procedure denied him due process. Accordingly, and without intending any comment as to the merits of the fair representation claim, this case is remanded to the district court for consideration of that claim.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

Office of the Clerk

January 8, 1976

To All Counsel of Record

No. 74-3706—Ralph Wells v. Southern Airways, Inc. and Airline Pilots Association International

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth,
Clerk

By /s/ Susan M. Gravors
Deputy Clerk

/smg

cc: Mr. Robert S. Savelson
Mr. John Bacheller, Jr.
Mr. William M. Pate

STATUTORY PROVISIONS

Railway Labor Act, as amended, Section 3(q), 45 U.S.C. § 153(q):

> (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

Railway Labor Act, as amended, Section 204, 45 U.S.C. § 184:

> SEC. 204. The disputes between an employee or group of employees and a carrier or carriers by air

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growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.